Standard Chartered Bank Malaysia Bhd v Eden Enterprises (M) Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D7-22-42 OF 2000
SELVENTHIRANATHAN J
27 FEBRUARY 2003

Banking *— Banks and banking business — Banking regulation — Transfer of assets and liabilities of transferor's banking business in Malaysia to transferee plaintiff — Transfer made pursuant to vesting order made under s 50 of the Banking and Financial Institutions Act 1989 — Whether vesting order made under s 50 only provided for transfer and vesting of whole of transferor's business worldwide upon plaintiff and not confined to the business of transferor located in Malaysia only — Whether vesting order valid*

Banking *— Banks and banking business — Banking regulation — Transfer of assets and liabilities of transferor's banking business in Malaysia to transferee plaintiff — Transfer made pursuant to vesting order made under s 50 of the Banking and Financial Institutions Act 1989 — Whether transferor and transferee plaintiff should have had recourse to s 4(3) of the Civil Law Act 1956 to transfer assets and liabilities of transferor's banking business — Whether circumstances stated in s 4(3) of the Civil Law Act 1956 to be construed as being restricted in its application to an absolute assignment only — Whether s 4(3) of the Civil Law Act 1956 capable of being resorted to for reconstructing financial institutions pursuant to ss 49 and 50 of the Banking and Financial Institutions Act 1989*

Civil Law Act *— Application — Banks and banking business — Chose in action — Transfer of assets — Transfer of assets and liabilities of transferor's banking business in Malaysia to transferee plaintiff — Transfer made pursuant to vesting order made under s 50 of Banking and Financial Institutions Act 1989 — Whether transferor and transferee plaintiff should have recourse to s 4(3) of the Civil Law Act 1956 to transfer assets and liabilities of transferor's banking business — Whether circumstances stated in s 4(3) of the Civil Law Act 1956 to be construed as being restricted in its application to an absolute assignment only — Whether s 4(3) of the Civil Law Act 1956 capable of being resorted to for reconstructing financial institutions pursuant to ss 49 and 50 of the Banking and Financial Institutions Act 1989*

Statutory Interpretation *— Aids to construction — Marginal notes — Extent to which they assist in construction of statutory provisions — Banking and Financial Institutions Act 1989 s 50*

Statutory Interpretation *— Construction of statutes — Applicability — Applicability of s 17A of the Interpretation Acts 1948 and 1967 to interpretation of ss 49 and 50 of the Banking and Financial Institutions Act 1989 — Whether word 'business' in s 50(8) of the Banking and Financial Institutions Act 1989 could be construed as being applicable to the whole or any part of the business of transferor's financial institution located anywhere in the world*

Standard Chartered Bank ('SCB'), a bank incorporated in England, agreed to give to the defendant an overdraft facility of RM2m and a revolving loan facility of RM7m ('the facilities'). SCB was the predecessor bank of the plaintiff and this action was brought by the plaintiff as the successor bank to SCB when the assets and liabilities

of the latter in Malaysia were transferred to and vested in the plaintiff pursuant to a vesting order made under s 50 of the Banking and Financial Institutions Act 1989 ('the Act') by the High Court in Kuala Lumpur ('the vesting order'). The vesting order was made pursuant to s 50 of the Act upon the joint application of SCB as the transferor of the said assets, rights, liabilities and obligations and the plaintiff as the transferee thereof to formalize and give effect to a sale and purchase agreement dated 12 April 1994 entered into between SCB and the plaintiff. The plaintiff alleged that the defendant defaulted in the payment of the interest under the revolving loan facility, thus compelling the plaintiff to recall both the facilities and demand the repayment of the defendant's outstanding debt. The plaintiff sued the defendant and the senior assistant registrar ('SAR') allowed the plaintiff to enter final judgment against the defendant under O 14 of the Rules of the High Court 1980 ('RHC'). This was the defendant's appeal against the decision of SAR. The defendant did not dispute the outstanding debt but contended that the transfer of the assets and liabilities of SCB to the plaintiff was not in accordance with the Act. The defendant's counsel contended that in view of the definition of the word 'business' in s 50(8) of the Act, the vesting order made under s 50 of the Act could only provide for the transfer and vesting of the whole of the business of SCB worldwide upon the plaintiff and could not be confined to that part of the worldwide business of SCB located in Malaysia alone. Consequently, it was argued that the vesting order was ultra vires the Act and therefore not binding on the defendant. The defendant's counsel further argued that SCB and the plaintiff should have resorted to s 4(3) of the Civil Law Act 1956 ('CLA') to effect the transfer of the loan from SCB to the plaintiff.

Held, dismissing the defendant's appeal:

(1) The instant appeal arose out of the application under O 14 of the RHC taken out by the plaintiff for summary judgment primarily on the ground that the defendant had no defence to this action. In the circumstances, it was clearly a fallacy on the part of the defendant to come to court in an application of this nature to attempt to challenge the vesting order, which was an order of another High Court and which had been made and duly perfected and applied in various proceedings before the superior courts in this country (see pp 88H–89A).

(2) Applying the principles laid down by Peh Swee Chin FCJ in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, this court had no business to look into the validity or otherwise of the vesting order as no step was taken by the defendant to have the order set aside in the proceedings in which it was granted. However, the view of the other two judges in *Badiaddin* appeared to be that the order can be attacked in collateral proceedings such as the present action but that view would necessarily have to be modified in the context of the

A overriding statutory provision found in s 50(3) of the Act, which provided for the non-challengability of an order made under s 50(1) of the Act (see pp 89B–C, 91G–I). *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 distinguished.

B (3) The relevant provisions of the Act were enabling in nature and not prohibitory in that they made possible the transfer of SCB's business in Malaysia as a whole to the plaintiff through a single application to the High Court. There was nothing in the Act to prohibit such transfer or to specify that such transfer would be null and void unless the whole of SCB's business worldwide C was transferred to the plaintiff at the same time as well (see pp 90G–91A).

(4) There was no necessity for SCB and the plaintiff to have recourse to s 4(3) of CLA in the light of the clear provisions of the Act providing specifically for the transfer of the whole or any part of D the business of a licensed institution to another entity. Moreover, ss 49 and 50 of the Act were enacted for a specific purpose, namely, the reconstruction of licensed institutions while s 50 of the Act was enacted specifically to give effect to those purposes through a vesting order of the High Court. The CLA, although dealing generally with the absolute assignment of a debt or other E legal chose in action in the circumstances stated in s 4(3) thereof, was to be construed as being confined or restricted in its application to such an absolute assignment only and therefore incapable of being resorted to for achieving the wider results intended by ss 49 and 50 of the Act in relation to the F reconstruction of financial institutions under the Act (see pp 92A–B, D–F).

(5) This was an appropriate case to apply s 17A of the Interpretation Acts 1948 and 1967 to the interpretation of ss 49 and 50 of the Act, in relation to the word 'business' in s 50(8) of the Act. In view of the use of the words 'the whole or any part of the business' in G s 49(1)(b) and 'any part of the business' in s 49(9)(a) of the Act, the argument espoused by the defendant's counsel in relation to the interpretation of the word 'business' in s 50(8) did not hold water. The interpretation of 'business' in s 50(8) of the Act must accordingly be construed as being applicable to the whole or any H part of the business of SCB located anywhere in the world. Although the marginal note to any provision in a law was not part of that law as enacted, the marginal note to s 50 of the Act confirmed the substantive provisions of ss 49(1)(b) and 49(9)(a) of the Act, that is, that they were to be applicable to the whole as well as any part of the business of a licensed institution I irrespective of wherever it may be located in the world. Therefore, the transfer of the business of SCB in Malaysia only to the plaintiff was intra vires the Act (see pp 92F–G, 93G–94B, 95B).

(6) The only ground on which the vesting order could conceivably be called into question would be either that it did not conform with the approved agreement or arrangement, or that the approved agreement or arrangement was ultra vires the Act or ultra vires any other law which prevailed over the Act, consequentially rendering the vesting order null and void. Here, there was no evidence to that effect (see p 95F–H).

[Bahasa Malaysia summary

Standard Chartered Bank ('SCB'), sebuah bank yang ditubuhkan di England, telah bersetuju memberikan kemudahan overdraf sebanyak RM2j kepada defendan dan juga kemudahan pinjaman pusingan sebanyak RM7j ('kemudahan tersebut'). SCB adalah bank terdahulu kepada plaintif dan tindakan ini dibawa oleh plaintif sebagai bank pengganti kepada SCB apabila aset serta liabiliti SCB di Malaysia dipindahkan dan diletakhak pada plaintif di bawah perintah letakhak yang dibuat di bawah s 50 Akta Bank dan Institusi-Institusi Kewangan 1989 ('Akta tersebut') oleh Mahkamah Tinggi di Kuala Lumpur ('perintah letakhak tersebut'). Perintah letakhak tersebut dibuat berasaskan s 50 Akta tersebut di atas permohonan bersama SCB sebagai pemindah kepada aset, hak, liabiliti dan obligasi dan plaintif sebagai penerima pindahan tersebut untuk merasmikan dan menguatkuasakan satu perjanjian jual beli yang bertarikh 12 April 1994 di antara SCB dan plaintif. Plaintif mendakwa defendan telah gagal untuk menyelesaikan bayaran faedah di bawah kemudahan pinjaman pusingan, seterusnya menyebabkan plaintif menarik balik kemudahan-kemudahan tersebut serta menuntut pembayaran semula baki hutang defendan. Plaintif telah menyaman defendan dan penolong kanan pendaftar ('PKP') telah membenarkan plaintif memasuki penghakiman muktamad ke atas defendan di bawah A 14 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Ini adalah rayuan defendan terhadap keputusan PKP itu. Defendan tidak mempertikaikan baki hutang tetapi mendakwa bahawa pindahan aset dan liabiliti SCB kepada plaintif tidak mengikuti Akta tersebut. Peguamcara defendan mendakwa bahawa memandangkan definisi perkataan 'business' dalam s 50(8) Akta tersebut, perintah letakhak yang dibuat di bawah s 50 Akta tersebut hanya dapat membuat pemindahan dan letakhak semua perniagaan SCB serata dunia ke atas plaintif dan tidak boleh dihadkan kepada sebahagian perniagaan serata dunia SCB yang terletak di Malaysia sahaja. Oleh itu, telah dihujahkan bahawa perintah letakhak adalah ultra vires Akta tersebut dan oleh itu tidak mengikat defendan. Peguamcara defendan mendakwa seterusnya bahawa SCB dan plaintif harus menggunakan s 4(3) Akta Undang-Undang Sivil 1956 ('AUS') untuk menguatkuasakan pindahan pinjaman daripada SCB kepada plaintif.

Diputuskan, menolak rayuan defendan:

(1) Rayuan ini timbul akibat permohonan di bawah A 14 KMT yang diambil oleh plaintif bagi penghakiman terus atas alasan bahawa defendan tidak ada pembelaan bagi tindakan ini. Dalam situasi ini, jelasnya merupakan satu salah anggapan defendan untuk datang ke mahkamah dalam permohonan sebegini dan cuba untuk mempertikaikan perintah letakhak, yang merupakan perintah Mahkamah Tinggi yang lain yang telah dibuat dan disempurnakan dan digunakan dalam pelbagai prosiding di hadapan mahkamah atasan dalam negara ini (lihat ms 88H–89A).

(2) Memakai prinsip-prinsip yang diberikan oleh Peh Swee Chin HMP dalam *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, mahkamah ini tidak ada bidangkuasa untuk menyoal kesahan ataupun sebaliknya perintah letakhak kerana tiada langkah telah diambil oleh defendan untuk mengenepikan perintah tersebut di dalam prosiding di mana perintah itu diberi. Walau bagaimanapun, pandangan dua orang hakim lain dalam *Badiaddin* seakan-akan kelihatan bahawa perintah tersebut boleh dipertikaikan dalam prosiding kolateral seperti dalam tindakan pada masa ini tetapi pandangan ini harus diubahsuai dalam konteks peruntukan statutori utama yang terkandung dalam s 50(3) Akta tersebut, yang tidak membenarkan satu perintah yang dibuat di bawah s 50(1) Akta tersebut dicabar (lihat ms 89B–C, 91G–I). *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 dibezakan.

(3) Peruntukan-peruntukan relevan Akta tersebut adalah membolehkan dan bukan melarang iaitu ia membolehkan pemindahan perniagaan SCB di Malaysia secara sepenuhnya kepada plaintif melalui satu permohonan ke Mahkamah Tinggi. Tiada sebarang peruntukan dalam Akta tersebut melarang pemindahan sebegini ataupun menjadikan pemindahan sebegini batal dan tak sah kecuali keseluruhan perniagaan SCB di serata dunia dipindahkan kepada plaintif pada masa yang sama (lihat ms 90G–91A).

(4) Tiada keperluan bagi SCB dan plaintif untuk menggunakan s 4(3) AUS memandangkan peruntukan jelas Akta tersebut yang secara khususnya membenarkan pemindahan keseluruhan mahupun mana-mana bahagian perniagaan sesebuah institusi berlesen kepada entiti lain. Lagipun, ss 49 dan 50 Akta tersebut digubal bagi tujuan khusus, iaitu, konstruksi semula institusi berlesen sementara s 50 Akta tersebut digubal secara khususnya untuk memberi kesan kepada tujuan tersebut melalui perintah letakhak oleh Mahkamah Tinggi. Walaupun AUS, secara amnya bertindak ke atas penyerahakan mutlak sesuatu hutang ataupun hak dalam

tindakan undang-undang yang lain dalam situasi yang diperuntukkan dalam s 4(3), harus ditafsirkan sebagai terbatas ataupun terhad dalam pemakaiannya kepada penyerahakan mutlak sebegitu sahaja dan tidak dapat dipakai untuk mencapai keputusan lebih luas sepertimana yang diingini oleh ss 49 dan 50 Akta tersebut berkaitan konstruksi semula institusi kewangan di bawah Akta tersebut (lihat ms 92A–B, D–F).

(5) Ini merupakan satu kes yang sesuai untuk memakai s 17A Akta-Akta Tafsiran 1948 dan 1967 untuk tafsiran ss 49 dan 50 Akta tersebut, berkaitan perkataan 'business' dalam s 50(8) Akta tersebut. Memandangkan penggunaaan perkataan-perkataan 'the whole or any part of the business' dalam s 49(1)(b) dan 'any part of the business' dalam s 49(9)(a) Akta tersebut, pernyataan yang disokong peguamcara defendan berhubung dengan tafsiran perkataan 'business' dalam s 50(8) adalah tidak berasas. Tafsiran 'business' dalam s 50(8) Akta tersebut oleh itu harus ditafsirkan sebagai terpakai kepada keseluruhan mahupun mana-mana bahagian perniagaan SCB yang terletak di mana-mana di seluruh dunia. Walaupun nota garisan sesuatu peruntukan undang-undang tidak menjadi sebahagian daripada undang-undang yang digubal, nota garisan kepada s 50 Akta tersebut mengesahkan peruntukan-peruntukan substantif s 49(1)(b) dan 49(9)(a) Akta tersebut, bahawa ia boleh dipakai kepada keseluruhan mahupun mana-mana bahagian perniagaan sesebuah institusi berlesen tidak kira di mana ia terletak di dunia. Oleh yang demikian, pemindahan perniagaan SCB di Malaysia sahaja kepada plaintif adalah intra vires Akta tersebut. (lihat ms 92F–G, 93G–94B, 95B).

(6) Satu-satunya alasan yang membolehkan perintah letakhak tersebut boleh dipertikaikan ialah bahawa ia tidak akur dengan perjanjian atau persetujuan yang diluluskan, ataupun bahawa perjanjian atau persetujuan yang diluluskan itu adalah ultra vires Akta tersebut atau ultra vires mana-mana undang–undang yang lain yang mengatasi Akta tersebut, yang menjadikan perintak letakhak tersebut tidak sah dan terbatal. Di sini, tiada keterangan sebegitu (lihat ms 95F–H).]

Notes

For cases on banking regulations, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue), para 1311.

For cases on the application of the Civil Law Act in bank and banking business, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue), para 2613.

For cases on marginal notes as aids to construction, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue), paras 1394–1398.

For cases on applicability for construction of statutes, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue), paras 1456.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (distd)

Leong Moh Sawmill Co Sdn Bhd (In liquidation) v Standard Chartered Bank & Ors [1996] 2 MLJ 614 (refd)

Dato Fathi bin Haji Ahmad, Per, ex p Standard Chartered Bank [1996] MLJU 596 (refd)

Standard Chartered Bank v Asia Transport Service (M) Sdn Bhd & Ors [1996] 1 MLJ 157 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 ss 49,(1)(b), (7), (9), (9)(a), (10), 50, (1), (1)(a)–(l), (2), (3), (7), (8)

Civil Law Act 1956 s 4(3)

Interpretation Acts 1948 and 1967 s 17A

Rules of the High Court 1980 O 14

Datuk MS Murthi (*Murthi & Partners*) for the defendant/appellant.
Lim Siew Ming (*Raja, Darryl & Loh*) for the plaintiff/respondent.

Selventhiranathan J: This was an appeal via encl 12 by the defendant against the decision of the learned senior assistant registrar ('the SAR') allowing the plaintiff to sign final judgment against the defendant upon its application to do so vide encl 5 pursuant to O 14 of the Rules of the High Court 1980 ('the O 14 application').

The undisputed facts showed that Standard Chartered Bank ('SCB'), a bank incorporated in England and with a business address at No 2 Leboh Pantai, PO Box 153, 10710 Penang, through a letter of offer dated 10 April 1992, agreed to give to the defendant an overdraft facility of RM2m and a revolving-loan facility of RM7m ('the facilities' or 'both the facilities'). SCB was the predecessor bank of the plaintiff and this action was brought by the plaintiff as the successor bank to SCB when the assets and liabilities of the latter in Malaysia were transferred to and vested in the plaintiff pursuant to a vesting order made by the High Court, the relevant terms of which will be elaborated upon later in this judgment.

The offer of the facilities was duly accepted by the defendant on 13 April 1992 as shown in exh 'TPC-1' annexed to the second affidavit of one Toh Pei Chien, the accounts manager of the plaintiff, which affidavit at encl 9 was affirmed on 3 April 2000.

The plaintiff alleged that the defendant defaulted in the payment of the interest under the revolving-loan facility, thus compelling the plaintiff to recall both the facilities and demand the repayment of the defendant's outstanding debt. As at 30 June 1999, under both the facilities, the total outstanding debt of the defendant was RM7,887,074.79, with accruing interest at 3.5%pa above the plaintiff's base lending rate, calculated from 1 July 1999 until the date of full settlement.

It is pertinent to note that the defendant did not dispute the outstanding debt at all but contended instead that the transfer of the assets and liabilities of SCB to the plaintiff was not in accordance with the law, namely, the Banking and Financial Institutions Act 1989 ('the Act'). It was therefore urged that the plaintiff did not have a good title to the monies which were loaned to the defendant and belonged to SCB for the reasons which will follow shortly. As such, it was argued that the plaintiff had no right to pursue this claim against the defendant.

Essentially, the defendant questioned the validity of a vesting order ('the vesting order') dated 28 April 1994 made by the High Court in Malaya at Kuala Lumpur in Originating Summons No D3-24-88-1994 transferring and vesting the assets, rights, liabilities and obligations, amongst others, of SCB in Malaysia upon the plaintiff. That vesting order was made by VC George J (as he then was) pursuant to s 50 of the Act upon the joint application of SCB as the transferor of the said assets, rights, liabilities and obligations and the plaintiff as the transferee thereof to formalize and give effect to a sale and purchase agreement dated 12 April 1994 entered into between SCB and the plaintiff. Hereinafter a reference to a section or other provision of law by itself shall mean that section or that other provision as it appears in the Act, unless stated otherwise.

The learned counsel for the defendant contended that the court, in granting the vesting order on the 28 April 1994 pursuant to s 50, had not taken into consideration the interpretation of the word 'business' in s 50(8) which reads as follows:

> For the purposes of this section —
>
> 'business' means any activity carried on for the purpose of gain or profit and includes all property derived from, or used in or for the purpose of, carrying on such activity and all rights and liabilities arising from such activity ... .

In view of the above interpretation provision, the learned counsel for the defendant submitted that the vesting order made under s 50 could only provide for the transfer and vesting of the whole of the business of SCB worldwide upon the plaintiff and could not be confined to that part of the worldwide business of SCB located in Malaysia alone, as was done by the vesting order. Consequently, it was urged that the vesting order was ultra vires the Act and therefore not binding on the defendant. He elaborated that the vesting order should have also provided for the transfer to and vesting in the plaintiff of the whole of the business of SCB located everywhere else in the world, 'in other countries such as in Hong Kong, Australia, New Zealand, India, and Pakistan' in order for the vesting order to be valid.

However, it must be remembered that the instant appeal before this court arose out of the O 14 application taken out by the plaintiff for summary judgment primarily on the ground that the defendant had no defence to this action. In the circumstances it was clearly a fallacy on the part of the defendant to come to court in an application of this nature to attempt to challenge an order of another High Court (ie the vesting order)

which had been made and duly perfected and applied in various proceedings before the superior courts in this country: see, for example, the decision of the Court of Appeal in *Leong Moh Sawmill Co Sdn Bhd (In liquidation) v Standard Chartered Bank & Ors* [1996] 2 MLJ 614; the decision of Richard Talalla J (as he then was) in *Standard Chartered Bank v Asia Transport Service (M) Sdn Bhd & Ors* [1996] 1 MLJ 157 and my decision in *Per Dato Fathi bin Haji Ahmad, ex p Standard Chartered Bank* [1996] MLJU 596. No doubt these decisions did not deal explicitly with the issue raised in the instant appeal but that was because, to my mind, it was a non-issue in view of the clear provisions of the Act, particularly s 50(3) providing for the non-challengability of an order made under s 50(1). Those provisions of the Act shall be detailed later in this judgment.

The learned counsel for the defendant placed heavy reliance on the decision of the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 in support of his contention that the vesting order was irregular and should be set aside and consequently result in the dismissal of the plaintiff's claim against the defendant. However, the principles enunciated in *Badiaddin* do not support the stand of the defendant and, further, must be read subject to the statutory stricture in s 50(3) putting any vesting order made under s 50(1) virtually beyond the pale of challenge by stipulating that 'the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section (ie s 50) or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings'.

In *Badiaddin*, the Federal Court, in considering the exceptional circumstances in which a final order of one High Court could be set aside by another High Court, laid down the principles to be applied in such a situation in the following terms in the judgment of Mohd Azmi FCJ (as he then was) at pp 409–925 of the report of that case:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank's* case [[1981] 1 MLJ 143] that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock, while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'.

The Privy Council through Lord Diplock also emphasized that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts ex debito justitiae the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 at p 39 provides the correct guideline on the subject:

> 'The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p 736) that "it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside".'

For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. (Emphasis added.)

Applying the above-emphasized principles to the facts of this action, one may well ask, rhetorically, how or in what manner did the vesting order, in the words of Mohd Azmi FCJ, 'defy a substantive statutory prohibition [in the Act] so as to render the defective order null and void on ground of illegality or lack of jurisdiction', bearing in mind that the Act itself in the all-encompassing language of s 50(3) does not permit any challenge to be mounted against the vesting order on any of the specified ostensible grounds on which such a challenge may otherwise be conceivably mounted?

The relevant provisions of the Act in this context are enabling in nature and not prohibitory in that they made possible the transfer of SCB's business in Malaysia as a whole to the plaintiff through a single application to the High Court, thereby obviating the need for a piecemeal transfer of the assets and liabilities related to the said business. There is nothing in the Act to prohibit such transfer or to specify that such transfer

would be null and void unless the whole of SCB's business worldwide is transferred to the plaintiff at the same time as well. If, as the learned counsel for the defendant stressed, ss 49 and 50 enabled the transfer of the whole of the worldwide business of SCB to the plaintiff, it defied logic to argue that that part of SCB's worldwide business located in Malaysia only could not be so transferred in the absence of any specific prohibitive provision in the Act, evinced in clear and unequivocal language, preventing the same from being done, as the whole of anything is made up of its component parts. Any such specific prohibitive provision was certainly not in existence for consideration under ss 49 and 50 or under the other provisions of the Act.

In fact, insofar as an attack on a final order of a court of unlimited civil jurisdiction with the intended result of rendering that order effete is concerned, the late Peh Swee Chin FCJ (as he then was) went further than the other judges of the Federal Court did in *Badiaddin* by explaining the efficacy of a perfected order of the High Court in the following words at pp 417–418 of the report of that case:

> Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation (see *Isaacs v Robertson* [1985] 1 AC 97; *Pembenaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100; *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* [1994] 2 MLJ 601. It is elementary that a superior court is not any inferior court or statutory tribunal (such as a Land Administrator under the National Land Code 1965 as in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37). *It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first. When one wishes to file such proceedings to so set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceedings or new action on any ground other than those mentioned in the quoted passage from Hock Hua Bank v Sahari bin Murid [[1981] 1 MLJ 143], and as mentioned later in this judgment in connection with a consent judgment.* (Emphasis added.)

If one were to apply the principles enunciated above by the late Peh Swee Chin FCJ, this court would clearly have no business to look into the validity or otherwise of the vesting order as no step was taken by the defendant to have the order set aside in the proceeding in which it was granted. It must also be borne in mind that his Lordship made the above pronunciation in a situation where there was no specific provision in a law, such as in the terms of s 50(3), to be considered. However, the view of the other two judges in *Badiaddin* appears to be that the order can be attacked in collateral proceedings such as the present action but that view will necessarily have to be modified in the context of the overriding statutory provision found in s 50(3).

The additional argument of the learned counsel for the defendant that s 4(3) of the Civil Law Act 1956 'can be invoked to validate prospectively the transfer of the loan' from SCB to the plaintiff and implying therefore that SCB and the plaintiff should have resorted to that section to effect the transfer is, with respect, untenable as there was no necessity for SCB and the plaintiff to have recourse to the said s 4(3) in the light of the clear relevant provisions of the Act providing specifically for the transfer of the whole or any part of the business of a licensed institution to another entity, pursuant to s 49(1)(b), with the approval of the Minister for the time being charged with the responsibility for finance ('the Minister') in accordance with the other provisions of s 49. Moreover, ss 49 and 50 were enacted for a specific purpose, ie for the reconstruction of licensed institutions as defined in the Act and to facilitate effect being given to such reconstruction, in a later law, being the Act, which came into force on 1 October 1989 as compared with the general purpose of the earlier s 4(3) of the Civil Law Act 1956 which came into force in West Malaysia on 7 April 1956 and in East Malaysia on 1 April 1972.

In the foregoing circumstances the insistence of the learned counsel for the defendant that the earlier s 4(3) of the Civil Law Act 1956, which was enacted for a general purpose, should be applied preferentially over the later ss 49 and 50 of the Act, which were enacted for specific purposes, has no basis in law and is consequentially devoid of any merit, particularly so when there is no conflict between the said s 4(3), and ss 49 and 50. Section 49 was enacted specifically for the purposes stated in that section while s 50 was enacted specifically to give effect to those purposes through a vesting order of the High Court. On the other hand, s 4(3) of the Civil Law Act 1956, although dealing generally with the absolute assignment of a debt or other legal chose in action in the circumstances stated in the said s 4(3), is to be construed as being confined or restricted in its application to such an absolute assignment only and therefore incapable of being resorted to for achieving the wider results intended by ss 49 and 50 in relation to the reconstruction of financial institutions under the Act.

In this context it would indeed be most apposite to apply s 17A of the Interpretation Acts 1948 and 1967 to the interpretation of ss 49 and 50, and in particular of s 50(8) in the context of the arguments of the learned counsel for the defendant adverted to earlier in this judgment in relation to the interpretation of 'business' in s 50(8), to arrive at the proper construction of those sections. The said s 17A reads as follows:

> Regard to be had to the purpose of Act
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Therefore, in addition to the foregoing, and having s 17A of the Interpretation Acts 1948 and 1967 in mind, the contention of the learned counsel for the defendant made in vacuo with reference only to the

A interpretation of the word 'business' in s 50(8) cannot stand if one were to look at s 49(1)(b), (7), (9) and (10) which provide as follows:

> Sanction required for reconstruction, etc of licensed institutions
>
> (1) No person shall enter into an agreement or arrangement —
>
> (a) ...;
>
> B (b) *for the* sale, disposal, *or transfer* howsoever, *of the whole or any part of the business* of a licensed institution;
>
> (c) ...; or
>
> (d) ...,
>
> unless —
>
> (A) the proposed agreement or arrangement is in writing; and
>
> C (B) all the parties thereto have first made an application in writing to the Minister for his approval of such agreement or arrangement and have obtained the Minister's approval thereto.
>
> (2) ...
>
> (3) ...
>
> D (4) ...
>
> (5) ...
>
> (6) ...
>
> (7) Upon receiving an application and the recommendation of the Bank under this section, [ie the Central Bank of Malaysia as interpreted in s 2 of the Act], the Minister may approve the application with or without any
>
> E modifications, variations or conditions, or refuse the application.
>
> (8) ...
>
> (9) An application under —
>
> (a) subsection (1)(b) shall not be recommended by the Bank for approval and shall not be approved by the Minister where the
>
> F agreement or arrangement would result in the sale, disposal, or *transfer* howsoever, *of any part of the business* of the licensed institution to any person which is not a licensed institution, except in relation to a part of the business, being a part which does not require to be licensed under this Act; and
>
> (b) subsection (1)(c) shall not be recommended by the Bank for
>
> G approval and shall not be approved by the Minister except in the case of an amalgamation or merger with another licensed institution.
>
> (10) *In this section, 'business' has the meaning assigned to it in section 50(8).* (Emphasis added.)

In view of the reference in s 49(10) to s 50(8) and the specifying of 'the
H whole or any part of the business' in s 49(1)(b) and 'any part of the business' in s 49(9)(a), the argument espoused by the learned counsel for the defendant in relation to the interpretation of the word 'business' in s 50(8) and to seek thereby to have the vesting order rendered null and void could not hold water. It is also trite that an interpretation provision in any law cannot be used to curb or prevail over the applicability of a substantive
I provision in that law expressed in clear and unequivocal language. The interpretation of 'business' in s 50(8) must accordingly be construed as being applicable to the whole or any part of the business of SCB located

anywhere in the world in the light of ss 49(1)(b) and 49(9)(a) as well as in the light of s 50(7) which is reproduced later in this judgment.

The marginal note to s 50 reads:

> Application to High Court to facilitate agreement or arrangement for transfer of whole or part of business of licensed institution being given effect to.

Although the marginal note to any provision in a law is not part of that law as enacted, the marginal note to s 50 confirms the substantive provisions of ss 49(1)(b) and 49(9)(a), ie that they were to be applicable to the whole as well as any part of the business of a licensed institution irrespective of wherever it may be located in the world: for further confirmation see s 50(7) reproduced below.

Section 50(1) enables the parties involved in any arrangement or agreement to transfer any business in respect of which the Minister has granted his approval under s 49(7) to apply to the High Court for such order 'as may be required by them to facilitate or enable the agreement or arrangement being given effect to ...'. Section 50(1) then lists out the orders that may be sought in terms of paras (a) to (l) thereof. Sections 50(2), (3) and (7) then provide as follows:

> (2) On the hearing of an application under subsection (1), the High Court may grant an order in the terms applied for, or with such modifications or variations as the Court deems just or proper in the circumstances of the case.
>
> Where the order of the High Court under subsection (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, *and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.*
>
> (4) ...
>
> (5) ...
>
> (6) ...
>
> (7) *An order of the High Court under subsection (1) may relate to any property or business of the transferor outside Malaysia* and, if it so relates, effect may be given to it either in accordance with any reciprocal arrangements relating to enforcement of judgments that may exist between Malaysia and the country, territory or place outside Malaysia in which such property or business is, or where there are no such arrangements, in accordance with the law applicable in such country, territory or place. (Emphasis added.)

It becomes abundantly clear from a complete and total reading of the provisions of the Act reproduced above that the contention of the learned

counsel for the defendant cannot be sustained. If reliance were to be placed solely on the interpretation of 'business' in s 50(8) to argue that it was intended that the whole of the business of SCB, irrespective of where it is located or conducted in the world, should have been transferred to the plaintiff by the vesting order, then s 50(7) would be rendered otiose. By providing for the transfer and vesting of any property or business of the transferor located outside Malaysia upon the transferee, that section clearly envisages the transfer as well as the non-transfer of any part of the worldwide business of SCB to the plaintiff in this action. Therefore the transfer of the business of SCB 'in Malaysia only' to the plaintiff is intra vires the Act and the interpretation provision relating to 'business' in s 50(8) cannot be used to render null and void the vesting order which reflected the clear intention of the legislature to allow the transfer to and vesting in the transferee plaintiff of the business of the transferor SCB, in whole or in part and located anywhere in the world, as approved by the Minister.

It further becomes crystal clear in light of the foregoing that the interpretation of 'business' in s 50(8) must mean any activity of the transferor carried on for the purpose of gain or profit in Malaysia as well as, by virtue of s 50(7), in any country, territory or place outside Malaysia. Any order made by the High Court under s 50 would be essentially to facilitate or enable the agreement or arrangement approved by the Minister pursuant to ss 49(1) and 49(7) to be given effect to, and when those sections provide 'for the sale, disposal or transfer howsoever of the whole or any part of the business of a licensed institution' (s 49(1)) to be first submitted to the Minister for his approval and, upon approval being granted with or without modifications, variations or conditions (s 49(7)), then to apply to the High Court to give effect to the approved agreement or arrangement, the vesting order which is made to facilitate or give effect to the approved agreement or arrangement cannot be impugned (s 50(3)) as long as it is in conformity with the agreement or arrangement as approved by the Minister. The only grounds on which the vesting order could conceivably be called into question would be either that it did not conform with the approved agreement or arrangement, or that the approved agreement or arrangement was ultra vires the Act or ultra vires any other law which prevailed over the Act, consequentially rendering the vesting order null and void. In the absence of any such evidence of the non-conformity of the vesting order with the approved agreement or arrangement in relation to SCB and the plaintiff, as well as in the absence of any such evidence of the approved agreement or arrangement being made ultra vires the Act or being made ultra vires any other law which prevailed over the Act, the argument of the learned counsel for the defendant was bound to and did collapse. The various judgments in *Badiaddin* should therefore be construed in this context before the principles set out therein could be called in aid to be applied to the facts of this action. Unfortunately, neither the learned counsel for the defendant nor for the plaintiff approached the issue in this action in the manner that it has been dealt with in this judgment.

For the above reasons, the appeal of the defendant in encl 12 was dismissed with costs and the order of the registrar allowing the plaintiff to sign final judgment against the defendant upon the terms as prayed for in the O 14 application was accordingly confirmed.

Defendant's appeal dismissed.

Reported by Lim Lee Na